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In the Supreme Court of the United States

DEBORAH MORSE, ET AL., PETITIONERS

v.

JOSEPH FREDERICK

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether, consistent with the First Amendment, public schools may prohibit students from promoting the use of illegal substances at school events.

2. Whether petitioner Morse is entitled to qualified immunity from suit based on her decision to discipline a student for displaying a large banner containing a slang endorsement of marijuana at a school event.

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INTEREST OF THE UNITED STATES

This case concerns the authority of public schools to prohibit student speech that promotes illegal drug use, and the qualified immunity of school officials who punish students for engaging in such speech. The United States has a substantial interest in those questions. The federal government has provided billions of dollars to support state and local drug-prevention programs. Recipients of grants under the Safe and Drug-Free Schools and Communities Act of 1994, 20 U.S.C. 7101 *et seq.*, must "convey a clear and consistent message that the illegal use of drugs * * * [is] wrong and harmful." 20 U.S.C. 7162(a) (Supp. III 2003). The United States administers numerous other programs that seek to deter illegal drug use, particularly among children. The fed-

eral government also operates hundreds of primary and secondary schools on military installations and Indian reservations. Finally, the same principles of qualified immunity that apply in suits against state and local officials apply in similar actions against federal officials.

STATEMENT

1. In January 2002, the Olympic torch was carried through Juneau, Alaska, en route to the Winter Olympic Games in Salt Lake City, Utah. Students in the Juneau public schools were permitted to attend the event during school hours. Most students at Juneau-Douglas High School gathered outside the school building, which was on the torch route. School administrators and teachers accompanied the students. Respondent Joseph Frederick, then a senior at the high school, was unable to reach school on time that morning because of snow in his driveway, but he was able to get to the sidewalk across Glacier Avenue in front of the school. There, he and some classmates unfurled a 14-foot-long banner with the message, "BONG HITS 4 JESUS," just as the torch relay and a television camera crew passed by the school. Pet. App. 2a, 24a-25a, 34a; Br. in Opp. 1 n.1.

Petitioner Juneau School Board has a written policy that "specifically prohibits any assembly or public expression that * * * advocates the use of substances that are illegal to minors" or otherwise "urges the violation of law." Pet. App. 53a. The board's policies likewise prohibit "[t]he distribution on school premises" of "materials that * * * advocate the use by minors of any illegal substance" or otherwise "urge the violation of law." *Id.* at 55a-56a.

In light of those policies, the school's principal, petitioner Deborah Morse, asked respondent to take down

the banner. When he refused, she took down the banner and later issued respondent a ten-day suspension. Pet. App. 2a. She told him that the banner "violated the [school] policy against displaying offensive material, including material that advertises or promotes use of illegal drugs." *Id.* at 3a. Although the banner did not physically disrupt the parade, the principal believed that it "sparked" subsequent pro-drug graffiti in the school. *Id.* at 2a. School officials determined that "[f]ailure to react to the display would appear to give the district's imprimatur to [the banner's pro-drug] message and would be inconsistent with the district's responsibility to teach students the boundaries of socially appropriate behavior." *Id.* at 3a.

2. Respondent unsuccessfully appealed his suspension, first to the school superintendent. Pet. App. 59a-67a. The superintendent concluded that respondent's advocacy of illegal drugs was "potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use." *Id.* at 62a. This Court's decision in *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675, 685 (1986), the superintendent reasoned, "teaches that the First Amendment does not require school districts to tolerate student speech that 'would undermine the school's basic educational mission.'" Pet. App. 61a.

The superintendent determined that respondent's banner "appeared to advocate the use of illegal drugs." Pet. App. 61a. "The common-sense understanding of the phrase 'bong hits,'" the superintendent explained, is "a means of smoking marijuana," and respondent failed to identify "any other credible meaning for the phrase." *Ibid.* The superintendent further found that respondent

"was not advocating legalization of marijuana or promoting a religious belief." *Id.* at 62a.

The superintendent also rejected respondent's contention that "he was not participating in a school activity." Pet. App. 63a. The superintendent noted that "teachers were authorized to allow their students to attend * * * as a class, provided the students were supervised at all times"; the school's "band was performing while students waited for the torch to arrive"; and "[t]he school district expended funds so that other students attending schools that were not on the torch route could bus their students to another location to see the event." *Ibid.* The superintendent "believe[d] it unreasonable to find that [respondent] can stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school." *Ibid.* Respondent appealed to the Juneau School Board, which adopted the superintendent's opinion. *Id.* at 68a-69a.

3. Respondent then filed suit against petitioners in federal district court, alleging that they were liable under 42 U.S.C. 1983 for violating his First Amendment rights. The district court granted summary judgment in favor of petitioners. Pet. App. 23a-42a. As a threshold matter, the court concluded that the students' viewing of the Olympic torch relay was a school-sponsored activity. *Id.* at 33a-35a. It pointed to evidence that, based on the event's "educational value and significance to the community," the principal had "authorized the teachers to take their classes to view the relay," "the band and cheerleaders were organized to greet the relay participants," and "teachers and administrative officials monitored students' actions." *Id.* at 34a.

Looking to this Court's student speech precedents, the court determined that petitioners had authority to

prohibit the banner because "this is not a case like *Tinker* [v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969),] where students chose to make a statement of personal opinion that was unrelated to the school's mission. To the contrary, [respondent's] statements directly contravened the Board's policies relating to drug abuse prevention." Pet. App. 35a-36a.

The court rejected respondent's argument that his banner did not advocate illegal drug use. Pet. App. 37a-38a. The court explained that "the determination of an administrator that a particular statement is in violation of school policy is generally not scrutinized so long as the administrator's interpretation is reasonable." *Id.* at 37a. Here, respondent's "admi[ssion] that the terms he used, including 'bong' and 'hit,' could be understood to refer to drugs shows that [petitioners'] understanding was reasonable." *Id.* at 38a.

The district court also held that petitioners in any event were protected by qualified immunity from suit for damages under Section 1983 because petitioner Morse "reasonably believed that she could and should suppress speech that encourages drug use among students in light of the decision in *Fraser* and the Board's policies prohibiting such language." Pet. App. 28a.

4. The court of appeals vacated and remanded. Pet. App. 1a-22a. At the outset, the court concluded that "this [is] a student speech case," in part because respondent "was a student, and school was in session." *Id.* at 5a, 6a. "[P]roceed[ing] on the basis that the banner expressed a positive sentiment about marijuana use," the court held that respondent's speech was nonetheless protected by the First Amendment because "a school cannot censor or punish students[']' speech merely be-

cause the students advocate a position contrary to government policy." *Id.* at 6a-7a, 8a.

The court acknowledged that *Fraser* recognizes the authority of public schools to prohibit student speech that "would undermine the school's basic educational mission." Pet. App. 11a (quoting *Fraser*, 478 U.S. at 685). But the court observed that a public school "is not entitled to suppress speech that undermines whatever missions it defines for itself." *Id.* at 12a. Instead, the court concluded, "student speech that is neither plainly offensive nor school-sponsored can be prohibited only where the school district demonstrated a risk of substantial disruption." *Id.* at 14a. According to the court, "[t]he phrase 'Bong Hits 4 Jesus' may be funny, stupid, or insulting, depending on one's point of view, but it is not 'plainly offensive' in the way sexual innuendo [the speech at issue in *Fraser*] is." *Id.* at 9a.

Finally, the court rejected petitioner Morse's qualified immunity defense. Pet. App. 18a-22a. It concluded that "no reasonable government official could have believed the censorship and punishment of [respondent's] speech to be lawful." *Id.* at 21a. The court explained that under its precedents, student speech may be prohibited only if it is offensive, disruptive, or school-sponsored, and here "there is nothing in the authorities that justifies what the school did." *Id.* at 20a, 21a.

SUMMARY OF ARGUMENT

I. "A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school." *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 266 (1988) (citation omitted). For at least three reasons, a public school may reasonably conclude

that student advocacy of illegal drug use is fundamentally inconsistent with the school's basic educational mission. First, it is inconsistent with the school's duty to protect the health and safety of students entrusted to its custody and care *in loco parentis*. Illegal drug use poses one of the greatest threats to the health and safety of the Nation's school children. A school district can reasonably conceive of its mission as including not only educating students, but doing so in an environment that keeps them free from the scourge of drugs during their K-12 years. Second, it is inconsistent with the school's need to maintain an effective learning environment, because drug use impedes students' ability to learn and promotes behavior antithetical to the educational mission. Third, it is inconsistent with the school's mission to "inculcat[e] fundamental values necessary to the maintenance of a democratic political system," *Ambach* v. *Norwick*, 441 U.S. 68, 77 (1979), because it encourages disrespect for and violation of the law.

The court of appeals erred in concluding that *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), requires schools to tolerate student advocacy of illegal drug use at school events. Under *Tinker*, schools may not prohibit speech based on "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. Petitioners did not, however, prohibit and punish respondent's speech for that reason; instead, they did so because respondent's message was inconsistent with the school's basic educational mission. Unlike respondent's banner, Tinker's armband protesting the Vietnam war did not advocate illegal conduct, and did not address a topic central to a school's basic educational mission.

The court of appeals further erred by applying heightened scrutiny on the theory that respondent displayed his banner off campus. Education occurs both in and out of the classroom, and the fact that field trips and other school events take place off campus does not deprive them of their educational character. Nor does it deprive school officials of the authority to apply school policies to their students. It would be especially illogical to apply heightened scrutiny in the context of this case. Not only was respondent a student attending a school-supervised event during normal school hours, he displayed his banner across the street from his school, in view of classmates on school property.

Petitioners reasonably understood respondent's "BONG HITS 4 JESUS" banner to refer to illegal drug use, and both lower courts properly declined to disturb that finding. Disciplinary decisions are ordinarily committed to the discretion of school administrators, who are in by far the best position to determine the contextual meaning of students' speech. Federal courts should be particularly reluctant to second guess the judgment of school administrators on a matter so central to the educational mission as deterring illegal drug use.

II. Even if petitioner Morse violated respondent's rights, she would be entitled to qualified immunity because it was not clearly established at the time she acted that respondent's conduct was protected by the First Amendment. The Ninth Circuit relied on cases stating generally that *Tinker* governs speech that is neither offensive nor school-sponsored. But the "question whether the right was clearly established must be considered on a more specific level." *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001). None of the cases relied on by the court of appeals addressed whether student advocacy of illegal

drug use is offensive to a school's basic educational mission, whether such advocacy satisfies *Tinker*'s interference standard, or whether different standards apply to student speech near, but not on, school premises.

ARGUMENT

I. PUBLIC HIGH SCHOOLS MAY DISCIPLINE STUDENTS WHO, WHILE ATTENDING SCHOOL EVENTS, ADVOCATE ILLEGAL DRUG USE

A. The First Amendment Does Not Protect Student Speech Contrary To A School's Basic Educational Mission, Including Speech That Advocates Illegal Drug Use

1. While students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393 U.S. at 506, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 682 (1986); accord *Kuhlmeier*, 484 U.S. at 266. Instead, the First Amendment—like other constitutional rights—"must be 'applied in light of the special characteristics of the school environment.'" *Kuhlmeier*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 506).[1]

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[1] Many constitutional rights apply differently in the school setting. See, *e.g.*, *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985) ("It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."); *Board of Educ. of Indep. Sch. Dist. No. 92* v. *Earls*, 536 U.S. 822 (2002) (same); *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 651 (1995) (same); *Ingraham* v. *Wright*, 430 U.S. 651, 682 (1977) (constitutional "safeguards [on corporal punishment] would * * * entail a significant intrusion into an area of primary educational responsibility"); *Goss* v. *Lopez*, 419 U.S. 565, 584 (1975) (disciplinary suspension ordinarily requires only "rudimentary procedures").

"The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by" this Court. *Ambach*, 441 U.S. at 76; see *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954); 20 U.S.C. 7247(a)(1) (federal grants for "character education"). Because the task of educating the Nation's children vests public schools with responsibility to teach impressionable young students, a school may prohibit student speech that "would undermine the school's basic educational mission." *Fraser*, 478 U.S. at 685; see *Kuhlmeier*, 484 U.S. at 266 ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school.") (quoting *Fraser*, 478 U.S. at 685); pp. 14-21, *infra*. Indeed, even outside of the school context, this Court has "repeatedly recognized the governmental interest in protecting children from harmful materials," *Reno* v. *ACLU*, 521 U.S. 844, 875 (1997), and has therefore upheld restrictions on expression that would be unconstitutional if applied to adults. *Ginsberg* v. *New York*, 390 U.S. 629, 637 (1968) (sale of pornography to minors).

2. Student advocacy of illegal drug use at a school event is manifestly inconsistent with a public school's basic educational mission, and therefore outside of the First Amendment's protection.

a. First. there are few greater threats to the Nation's school children and public education system than illegal drugs. School authorities act *in loco parentis*, with responsibility for the health and safety of students entrusted to their custody. *Vernonia*, 515 U.S. at 654-655; *Earls*, 536 U.S. at 830. In discharging that responsibility, the Juneau public schools, like public schools

across the country, have adopted a health and safety curriculum that, among other things, educates students about the dangers of illegal drug use and discourages them from engaging in such activity. See J.A. 80, 83-87.

The health and safety mission of our public schools is especially pronounced in the context of this case. School children are not only more vulnerable to drug use than adults, but such abuse is more likely to devastate their lives. "School years are the time when the physical, psychological, and addictive effects of drugs are most severe. 'Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound'; 'children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor.'" *Vernonia*, 515 U.S. at 661 (quoting Hawley, *The Bumpy Road to Drug-Free Schools*, 72 Phi Delta Kappan 310, 314 (1990)); see Office of Nat'l Drug Control Policy, *National Drug Control Strategy: 2001 Annual Report* 10. Certainly, a school can conceive of its mission as involving not only the graduation of well-educated students, but students who have emerged from their K-12 years free from the scourge of illegal drugs.

Second, not only does student advocacy of illegal drug use undermine a school's anti-drug curriculum, it also places the school curriculum as a whole in jeopardy, for the use of illegal drugs harms the educational process itself. Students who use illegal drugs are more likely to suffer from impaired cognitive capabilities, more likely to struggle in the classroom, and more likely to leave school prematurely.[2] Moreover, the effects of

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[2] See, *e.g.*, Office of Applied Studies, Substance Abuse and Mental Health Services Administration, *Academic Performance and Sub-*

illegal drug use by students "are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Vernonia*, 515 U.S. at 662. "[D]rug or alcohol use" by school children is, quite simply, "inconsistent with 'the shared values of a civilized social order.'" *Kuhlmeier*, 484 U.S. at 272 (quoting *Fraser*, 478 U.S. at 683).

Finally, advocating any illegal behavior—including use of illegal drugs—is antithetical to the educational mission. As this Court emphasized in *Fraser*, schools must "inculcat[e] fundamental values necessary to the maintenance of a democratic political system." 478 U.S. at 681 (quoting *Ambach*, 441 U.S. at 77). Thus, "teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society." *Ambach*, 441 U.S. at 78. Respect for the law is a fundamental democratic value, because our society depends on the willingness of its members to work to change objectionable laws, rather than simply violating them. Advocacy of unlawful conduct therefore strikes at the heart of a school's basic educational mission to teach fundamental democratic values.

b. Given the extent to which students conform their actions to the behavior and values of their peers, speech advocating the use of illegal drugs is particularly damaging when it comes from students. Peer pressure is a major factor in childrens' decision to use drugs. See *Earls*, 536 U.S. at 840 (Breyer, J., concurring); *Vernonia*, 515 U.S. at 663 (discussing a school's "drug prob-

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stance Use Among Students Aged 12 to 17: 2002, 2003, and 2004 (2006); National Institute on Drug Abuse, National Institutes of Health, Research Report Series, *Marijuana Abuse* 1, 5 (2005); Michael Lynskey and Wayne Hall, *The Effects of Adolescent Cannabis Use on Educational Attainment: A Review*, 95 Addiction 1621, 1621-1629 (2000).

lem largely fueled by the 'role model' effect of athletes' drug use"). As a result, an effective anti-drug program must not only teach the dangers of drugs; it must also protect impressionable young people from the countervailing effects of peer pressure. At a minimum, such a program entails prohibiting student advocacy of illegal drug use in school or at school events, where students are entrusted to the schools' care.

In the Safe and Drug-Free Schools and Communities Act of 1994, 20 U.S.C. 7101 *et seq.*, Congress recognized the importance of sending a "clear and consistent message" to impressionable school-age children that illegal drug use is unacceptable. 20 U.S.C. 7162(a) (Supp. III 2003). Congress authorized federal grants under that statute to support, among other things, "local programs of school drug * * * prevention." 20 U.S.C. 7102(1) (Supp. III 2003). Significantly, applications by local educational agencies must contain "assurance[s] that drug * * * prevention programs supported [by the grant] * * * convey a *clear and consistent message* that * * * the illegal use of drugs [is] wrong and harmful." 20 U.S.C. 7114(d)(6) (Supp. III 2003) (emphasis added); see 20 U.S.C. 7162(a) (Supp. III 2003). By prohibiting student advocacy of illegal drugs, the schools are not only acting on the basis of their own educational judgments; they are acting consistent with federal policy.

The anti-drug curriculum in schools is especially important in light of the "drug problem in our Nation's schools," which is "serious in terms of size, the kinds of drugs being used, and the consequences of that use." *Earls*, 536 U.S. at 839 (Breyer, J., concurring). In 2005, approximately one-half of all students in the twelfth grade had used an illicit drug, and more than one-half of those students had used an illicit drug other than mari-

juana. 1 National Institute on Drug Abuse, National Institutes of Health, *Monitoring the Future: National Survey Results on Drug Use, 1975-2005*, at 99 (2006). Indeed, approximately one-fourth of twelfth graders had used an illicit drug *in the past 30 days*. *Id.* at 101. In light of the gravity of the problem, this Court has recognized that the governmental interest in deterring drug use by school children is "important—indeed, perhaps compelling." *Vernonia*, 515 U.S. at 661. In fact, "few interests are more 'compelling' than ensuring that minors do not become addicted to a dangerous drug before they are able to make a mature and informed decision as to the health risks associated with that substance." *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 599 (2001) (Stevens, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citation omitted).

B. While Student Speech May Not Be Banned Merely To Avoid Controversy, It May Be Banned If It Is Inconsistent With A School's Basic Educational Mission

The court of appeals erred in concluding that *Tinker* prevents schools from prohibiting student advocacy of illegal drug use at school events. See Pet. App. 7a-8a. This case is governed not by *Tinker*, which applies when a school merely seeks to avoid controversy and prevent disturbances, but instead by *Fraser* and *Kuhlmeier*, which confirm that a school can prohibit speech inconsistent with its basic educational mission.

1. The court of appeals believed that under *Tinker*, "students retain First Amendment expression rights at school, which may be suppressed only if authorities reasonably 'forecast substantial disruption of or material interference with school activities.'" Pet. App. 5a n.3

(quoting *Tinker*, 393 U.S. at 514). The "only" in that sentence is where the Ninth Circuit went wrong.

In *Tinker*, a school prohibited students from wearing armbands to school to protest the Vietnam war. 393 U.S. at 504. After explaining that the school prohibited the armbands "to avoid the controversy which might result from the expression" (out of a belief that "the schools are no place for demonstrations"), this Court held that "to justify prohibition of a particular expression of opinion, [a school] must be able to show that its action was caused by *something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.*" *Id.* at 509 & n.3, 510 (emphasis added). It was only in that context—where the asserted governmental interest was preventing controversy—that the Court stated that a student "may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id.* at 513 (citation omitted).

Significantly, the *Tinker* Court made clear that schools can restrict student speech for reasons *other than* avoiding controversy. The Court stressed, for example, that "this case does not concern speech or action that intrudes upon the work of the schools," because "[t]here is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work." 393 U.S. at 508.

Hence, the circumstances in *Tinker* were quite different in several respects. The asserted governmental interest here is not preventing controversy, but preventing illegal drug use—a matter that, as discussed, di-

rectly threatens the basic educational mission of schools. While the students in *Tinker* opposed the Vietnam war, they did not advocate lawless action, such as illegal resistance to the draft or vandalism of recruiting stations.

Moreover, while the court of appeals viewed this case as presenting the general question whether a school can prohibit "a social message contrary to the one favored by the school," Pet. App. 7a, this case does not involve just any "social message"—it involves advocacy of dangerous drug use, which, unlike the speech in *Tinker*, "interfere[s] with the work of the school," *Tinker*, 393 U.S. at 509. The educational mission and *in loco parentis* responsibilities of schools do not require them to take a stand on the advisability of a foreign war waged by the federal government. But they most certainly do require schools to protect students' health, safety, and ability to learn. See pp. 10-12, *supra*. That point is confirmed by Congress's insistence that grant recipients under the Safe and Drug-Free Schools and Communities Act of 1994 "convey a clear and consistent message that the illegal use of drugs * * * [is] wrong and harmful," 20 U.S.C. 7162(a) (Supp. III 2003), as well as by this Court's cases stressing the importance of the schools' interest in combating student drug use. See pp. 13-14, *supra*.

Any remaining doubt should be resolved in favor of the school district's educational judgment, set forth in its written policies. "No single tradition in public education is more deeply rooted than local control," *Milliken* v. *Bradley*, 418 U.S. 717, 741 (1974), and this case underscores the wisdom of the Court's "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Kuhlmeier*,

484 U.S. at 273. The school board's decision to oppose illegal drug use as part of its basic educational mission, and to disassociate itself from pro-drug speech by banning it at school events, represents an unassailable, common-sense educational judgment entitled to deference from the federal courts. The Ninth Circuit's test, by contrast, would put federal courts in a difficult position of second-guessing local school boards and the reasonableness with which local officials forecast disruption of school activities. As this case amply demonstrates, that is not an appropriate role for a federal court.

In any event, even if *Tinker*'s "interference with school activities" standard applied in this context (393 U.S. at 514), it would be satisfied. *Tinker* did not consider only whether classroom activities were disrupted. Instead, it looked broadly to whether there was interference—"actual or nascent"—with "the work of the schools *or* any class." *Id.* at 508 (emphasis added). If schools permitted advocacy of illegal drugs, such speech could counteract, if not drown out, the schools' anti-drug message, especially because of peer pressure. Permitting students to make light of the school's anti-drug message or launch a pro-drug use campaign would undermine both that message and the school's disciplinary authority generally. There is no reason a school should have to wait and see whether speech promoting illegal drug use actually has that effect before taking action, especially where, as here, the question concerns the educational message conveyed to students, not the avoidance of controversy. Cf. *Earls*, 536 U.S. at 836 ("[I]t would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.").

Here, moreover, the school had gathered its students to view the relay of the Olympic torch. The juxtaposition between an event honoring amateur athletic competition and the use of marijuana made the speech particularly disruptive. By unveiling his bong-hits banner just as the torch passed, see Pet. App. 25a, respondent both exploited the event to maximize the impact of his message and interfered with the work of the schools by distracting others' attention from the very event the school wanted them to observe. And the potential reach of the message was magnified still further by the fact that respondent unfurled the banner right as a television camera crew walked by, which had the potential of increasing the publicity surrounding the banner. *Id.* at 2a.

2. Any doubt regarding the validity of petitioners' response is removed by *Fraser* and *Kuhlmeier*. In *Fraser*, the Ninth Circuit held that *Tinker* barred a school from punishing a student for making a sexually suggestive speech at a school assembly. 478 U.S. at 679-680. This Court reversed. Explaining that the *Tinker* Court had been "careful to note that [*Tinker*] did 'not concern speech or action that intrudes upon the work of the schools or the rights of other students,'" this Court held that schools may prohibit "lewd, indecent, or offensive speech." *Id.* at 680, 683 (quoting *Tinker*, 393 U.S. at 508). The Court explained that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech * * * would undermine the school's basic educational mission." *Id.* at 685. Thus, "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685-686.

In *Kuhlmeier*, this Court summed up the relationship between *Tinker* and *Fraser*. Under *Tinker*, the Court explained, students "cannot be punished *merely* for expressing their personal views * * * unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.'" 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 509). But under *Fraser*, the Court continued, "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission.'" *Ibid.* After discussing those two categories of student expression, the Court in *Kuhlmeier* then addressed a third, holding that a school has even greater latitude in regulating student speech when the speech is sponsored by the school, such as in a school-published newspaper. *Id.* at 273.[3]

Fraser and *Kuhlmeier* thus confirm that public schools may prohibit speech that is inconsistent with their basic educational mission in order to disassociate themselves from such speech, and thereby reinforce the values—here, avoidance of illegal drug use—they seek to teach. As the Fourth Circuit explained in upholding a school's prohibition on the distribution of a student newspaper containing an advertisement for illegal drug equipment, disruption under *Tinker* "is merely one justification for school authorities" to restrict student speech; it is not "the sole justification." *Williams* v. *Spencer*, 622 F.2d 1200, 1206 (1980). And here, the school can prohibit student advocacy of illegal drug use

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[3] When a school affirmatively seeks to advance or encourage student expression as part of its educational mission, it has broad latitude to act based on any "legitimate pedagogical concerns," including concerns that speech is "ungrammatical, poorly written, inadequately researched, [or] biased or prejudiced." *Kuhlmeier*, 484 U.S. at 271, 273.

on the ground that such speech would be inconsistent with the school's basic educational mission. *Boroff* v. *Van Wert City Bd. of Educ.*, 220 F.3d 465, 470 (6th Cir. 2000), cert. denied, 532 U.S. 920 (2001); see *id.* at 472, 474 (Gilman, J., dissenting on other grounds).

The court of appeals attempted to limit *Fraser* to its facts by stating that this case, unlike *Fraser*, does not involve sexually offensive speech. Pet. App. 9a. As discussed above, however, the reason this Court held that sexually offensive speech could be prohibited is that it is "inconsistent with the 'fundamental values' of public education." *Fraser*, 478 U.S. at 685-686. Nothing in *Fraser* supports the novel proposition that *only* sexual speech can be inconsistent with a school's basic educational mission. While sexual innuendo may be "seriously damaging" to students, *id.* at 683, there is no comparison with the toll that illegal drug use may have on the lives of school children and the threat posed by illegal drugs in the Nation's schools, see pp. 10-14, *supra*.

Nor is *Fraser* distinguishable on the ground that it permits punishment based solely on the manner, as opposed to the content, of student speech. The speech at issue in *Fraser* did not include any profane words; instead, this Court explained that it was the "sexual *content* of [the student's] speech" that distinguished it from Tinker's armband. *Fraser*, 478 U.S. at 680 (emphasis added); see *id.* at 691 (Stevens, J., dissenting on other grounds) ("[A] school faculty must regulate the content as well as the style of student speech in carrying out its educational mission."); cf. *id.* at 687 (Brennan, J., concurring in the judgment) (quoting the student speech).

The court of appeals stated that "government is not entitled to suppress speech that undermines whatever missions it defines for itself," and there must be "some

limit on the school's authority to define its mission." Pet. App. 11a, 12a. As discussed, however, petitioners' effort to combat illegal drug use by students is hardly some illegitimate, self-appointed mission; to the contrary, it is fundamental to the school's discharge of its most basic responsibilities to protect the health and safety of students entrusted to its care, maintain an effective learning environment, and teach democratic values (including respect for the law). See pp. 10-14, *supra*. Courts owe great deference to the judgments of school officials regarding their educational mission. In any event, whatever doubt might exist at the outer edges of a school's educational mission, the speech at issue in this case cuts to the core of that mission.[4]

C. Respondent Was Participating In A School Event

The court of appeals acknowledged that petitioners might be able to prohibit respondent's message during some school events, but held that they could not do so here because the Olympic torch relay was not an "official school activity," but instead "took place out of school while students were released." Pet. App. 10a, 11a. That holding is difficult to square with the court of appeals' own recognition that this is a "student speech case." *Id.* at 1a, 5a. As the court of appeals explained, respondent was a student, school was in session, the school released students from their classrooms for the specific

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[4] To be sure, the First Amendment generally protects "advocacy of * * * law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam). The standard is different in the school context in light of the unique concerns recognized by this Court's cases. Accordingly, schools need not tolerate speech advocating lawless action that the government would lack authority to proscribe outside the school context.

purpose of watching the Olympic torch relay in front of the school, and the students were subject to at least some measure of supervision. *Id.* at 5a.

That the relay occurred on a public street and not in a classroom is of no moment. As this Court has explained, education occurs both in and out of the classroom. See *Fraser*, 478 U.S. at 683 ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class."); cf. *Tinker*, 393 U.S. at 512-513. Field trips, for example, are an integral part of the learning experience, and the fact that they take place off campus does not deprive them of their educational character or diminish the authority of school officials to regulate student conduct and expression to ensure that the school's educational mission is not undermined. *A fortiori*, the fact that students cross the street to participate in a school event does not deprive the event of its educational character.

The court of appeals acknowledged that "[o]ne can hypothesize off-campus events for which the students might be released that would be educational and curricular in nature," but decided that "a Coca Cola promotion as the Olympic torch passed by on a public street was not such an event." Pet. App. 12a. The court gave no basis for that distinction, and there is none. Coca Cola may have sponsored the relay, but the school sponsored its students' attendance at that event, just as a school sponsors its students' attendance at a museum, theatrical production, or other cultural event that may enjoy corporate sponsorship. Here, because school was in session, the school's decision to authorize students to view the event was the only reason respondent was not required to be in a classroom.

Nor is there is any basis in the First Amendment for applying different levels of scrutiny to student conduct or expression at different off-campus school events. Regardless of the type of event, the school's educational mission, custodial responsibilities, and interest in regulating student conduct and expression remain, no matter how much the Ninth Circuit might question the pedagogical significance of this or any other event. Indeed, schools have an additional interest in establishing standards of appropriate behavior when students attend school events away from school premises, in order to prepare students for life in the broader world and instill values of respect and civility when they interact with others outside the immediate school environment. Accordingly, the school board's written disciplinary policies in this case apply to "approved social events and class trips" in the "same manner" they apply to "the regular school program." Pet. App. 58a. Applying different standards at different off-campus events would send mixed signals to students, and would make it very difficult for courts, let alone school administrators and teachers with little or no legal training, to do their jobs.

This is a particularly unlikely case for heightened scrutiny because the Olympic torch relay passed directly in front of respondent's school, and students watched from both sides of the street. See Pet. App. 2a, 63a; J.A. 9, 15. Which side of the street respondent chose to stand on during a school event is simply not a constitutionally dispositive fact. Moreover, respondent unfurled his banner in view of students who were watching the relay from school grounds. Pet. App. 30a n.21. Especially when a student displays a message to other students who are on school grounds during normal school hours, normal student-speech principles apply.

D. Petitioners Reasonably Understood Respondent's Banner To Advocate Illegal Drug Use

1. When the government acts as sovereign to regulate expression, courts ordinarily make an independent assessment of the facts. See, *e.g.*, *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648-649 (2000). When the government does not act merely as a sovereign, however, different procedures apply. For example, in the context of public employment, where the government may prohibit some speech by employees that it could not punish outside of the employment relationship, the courts consider the facts "as the employer *reasonably* found them to be," including facts concerning "what the speech was, in what tone it was delivered, [and] what the listener's reactions were." *Waters* v. *Churchill*, 511 U.S. 661, 668, 676-677 (1994) (plurality opinion); see *id.* at 685 (Souter, J., concurring) (explaining that the *Waters* plurality opinion is "the holding of the Court" because a "majority of the Court agrees that employers whose conduct survives the plurality's reasonableness test cannot be held constitutionally liable"). This Court explained that employers should be able to rely in part on their own experience and knowledge, and not be constrained by how a lay jury would understand the facts. See *id.* at 676.

Those considerations apply with even greater force in schools, where school administrators' day-to-day experiences with students committed to their custody and care give them by far the best understanding of the meaning of students' language, how that language is understood by other students, and the risks the speech poses in the school environment. Similarly, disciplinary decisions are ordinarily committed to school administrators' discretion, *Ingraham*, 430 U.S. at 681-682, in part

because "[e]vents calling for discipline are frequent occurrences," requiring that discipline be both "swift and informal" to be effective. *T.L.O.*, 469 U.S. at 339, 340 (quoting *Goss*, 419 U.S. at 580). And school administrators may impose corporal punishment based on their reasonable belief that it is necessary for a child's education. *Ingraham*, 430 U.S. at 661. It would be anomalous at best to employ a more stringent standard of review for a school official's factual assessments underlying a student's suspension than for assessments underlying a student's corporal punishment or an employee's firing.

Although the *Fraser* Court did not address that question because it found the student speech "plainly offensive," 478 U.S. at 683, Justice Brennan's concurrence found the school officials' punishment of the speech permissible because it was "not unreasonable," *id.* at 689 n.2. In *Kuhlmeier*, this Court likewise reviewed censorship of a school-sponsored student newspaper for reasonableness. 484 U.S. at 273, 274. Similarly here, when a school administrator reasonably construes a student's speech to advocate illegal drug use, the courts should accept that construction.

2. Petitioners reasonably understood respondent's banner to advocate illegal drug use. Following an administrative process during which respondent was represented by counsel, the superintendent found that respondent was disciplined "because his speech appeared to advocate the use of illegal drugs." Pet. App. 61a. The phrase "bong hit" is a slang reference to a particular way of smoking marijuana. See, *e.g.*, J.A. 117. Respondent himself "admitted that the terms he used, including 'bong' and 'hit,' could be understood to refer to drugs," Pet. App. 38a, and that "many people have taken that to be the meaning," J.A. 59. While the additional phrase "4

Jesus" is presumably unusual in this context, the fact remains that the banner advocated "bong hits," *i.e.*, illegal marijuana use, and that petitioners were in the best position to evaluate how the banner would be perceived by other students. Thus, the superintendent was on firm ground in "agree[ing] with the principal and countless others who saw the banner as advocating the use of illegal drugs." Pet. App. 61a-62a.

Neither of the lower courts took issue with that conclusion. The district court held that the school "administrator's interpretation [of respondent's message] is reasonable," Pet. App. 37a, and the court of appeals likewise "proceed[ed] on the basis that the banner expressed a positive sentiment about marijuana use, however vague and nonsensical," *id.* at 6a-7a. There is no reason for this Court to reach a different conclusion.

3. The court of appeals expressed the view that "it is not so easy to distinguish speech about marijuana from political speech" in Alaska, in part because "referenda regarding marijuana legalization repeatedly occur" there. Pet. App. 9a. Respondent expressly advocated bong hits, however, not the legalization of bong hits, and the superintendent found that he "was not advocating the legalization of marijuana." *Id.* at 62a. That reasonable finding is entitled to deference, as discussed above, and was not disturbed by either of the lower courts, notwithstanding the court of appeals' ruminations about the politics of marijuana in Alaska.[5]

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[5] The court of appeals observed that the legality of marijuana use in Alaska is "complicated" because Alaska courts have held that Alaska law does not prohibit adults from possessing small amounts of marijuana in their homes for personal use. Pet. App. 6a n.4; see *Noy* v. *State*, 83 P.3d 538, 542 (Alaska Ct. App. 2003). There is no question, however, that federal law prohibits marijuana possession and use,

In any event, even if respondent's banner were somehow understood to advocate legalization of marijuana, that would not immunize it from school discipline. Under *Fraser* and *Tinker*, the ultimate question is not whether student speech could be considered "political," but whether it is inconsistent with the schools' basic educational mission. See pp. 18-19, *supra*. *Tinker* recognizes that there may be times and places in the school setting where political speech is out of place. See, *e.g.*, 393 U.S. at 508. If a student brought a copy of a court decision concerning marijuana's legal status to school and opined on a point of law in civics class, that speech presumably would be protected. But at the same time, "legalize" is not a magic word that clothes speech advocating drug use from school discipline. And students do not have a First Amendment right to display "legalize marijuana" *banners* at school assemblies—or at school-supervised events like the one at issue here. As a practical matter, whether student speech is protected will depend on context, and courts should defer to the reasonable judgments of school administrators on such contextual evaluations.

II. EVEN IF RESPONDENT'S DISPLAY OF THE BANNER WERE CONSTITUTIONALLY PROTECTED, PETITIONER MORSE WOULD BE ENTITLED TO QUALIFIED IMMUNITY

Petitioner Morse would be entitled to qualified immunity even if respondent's speech were protected by the First Amendment. "Qualified immunity is not the law simply to save trouble for the Government and its employees; it is recognized because the burden of trial

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Gonzales v. *Raich*, 545 U.S. 1, 14 (2005), and that Alaska law also prohibits marijuana possession and use by minors, *Noy*, 83 P.3d at 541.

is unjustified in the face of a colorable claim that the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was." *Will* v. *Hallock*, 126 S. Ct. 952, 959 (2006). In determining whether "the law on point" was clear, this Court has repeatedly emphasized that the relevant "law" is that applicable in "the specific context of the case, not as a broad general proposition." *Brousseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (quoting *Saucier*, 533 U.S. at 201). Absent qualified immunity, school administrators' ability to maintain discipline in the schools could be chilled by the prospect of personal liability.

As recently as 2005—three years after the events in this case—the en banc Seventh Circuit noted that "[m]any aspects of the law with respect to students' speech * * * are difficult to understand and apply." *Hosty* v. *Carter*, 412 F.3d 731, 739 (2005), cert. denied, 126 S. Ct. 1330 (2006). Of particular relevance, there has been a continuing debate over how to reconcile *Fraser* with *Tinker*. See, *e.g.*, *Harper* v. *Poway Unified Sch. Dist.*, 445 F.3d 1166, 1193 n.1 (9th Cir. 2006) (Kozinski, J., dissenting), petition for cert. pending, No. 06-595 (filed Oct. 26, 2006). Even a recent decision that agreed with aspects of the decision below emphasized that "the unsettled waters of free speech rights in public schools" are "rife with rocky shoals and uncertain currents," especially with respect to the relationship between *Fraser* and *Tinker*. *Guiles* v. *Marineau*, 461 F.3d 320, 321 (2d Cir. 2006); see *id.* at 326.

The court of appeals nonetheless made the implausible assertion that "opacity in this particular corner of the law has been all but banished" by an earlier Ninth Circuit case stating generally that "the standard for reviewing the suppression of vulgar, lewd, obscene, and

plainly offensive speech is governed by *Fraser*, school-sponsored speech by [*Kuhlmeier*], and all other speech by *Tinker*," *Chandler* v. *McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (citations omitted). Pet. App. 20a. That tripartite framework is incomplete, but even if it were accurate, it could at best provide a starting point for the analysis. As in *Saucier*, the "question whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals." 533 U.S. at 200. The law must provide an official clear notice "that his conduct was unlawful *in the situation he confronted*." *Id.* at 202 (emphasis added); accord *Brosseau*, 543 U.S. at 198.

Under those standards, *McMinnville* would have clearly established respondent's alleged right only if it were also clear that respondent's banner was not plainly offensive or school-sponsored and did not satisfy the *Tinker* interference standard. At the time petitioners acted, however, there was no authoritative judicial resolution on whether student advocacy of illegal drug use enjoys First Amendment protection. The only case cited by the court of appeals that dealt with a pro-drug message *upheld* the school administrators' decision to prohibit and punish the speech, albeit in a distinguishable context. See *Boroff*, 220 F.3d at 470. *McMinnville* likewise acknowledged that "schools need not tolerate student speech that is inconsistent with [their] 'basic educational mission.'" 978 F.2d at 527 (quoting *Fraser*, 478 U.S. at 685). But it had no occasion to discuss the relevance of that principle in circumstances analogous to this case, because the question there was whether buttons worn by students containing the word "scab" were offensive or disruptive. *Id.* at 530.

Even setting to the side the longstanding uncertainty concerning the relationship between *Tinker* and *Fraser*, the Ninth Circuit ultimately relied on the unique facts of this case by stating that petitioners might have been able to prohibit respondent's message on a T-shirt, on school grounds, or at a different type of off-campus event. Pet. App. 12a, 17a n.45. Those are precisely the types of subtle distinctions, unresolved in existing precedents, upon which school administrators' personal liability ought not turn. Indeed, the court of appeals held that school administrators, who are not ordinarily lawyers, should have been able to discern a constitutional line that the district court (which ruled in petitioners' favor) was unable to detect.

Even the court of appeals did not assert that all of its distinctions were clearly established in the law. Instead, while conceding that "[w]e have no Ninth Circuit authority precisely on point," the court stated that "what we do have is *consistent*" with the court's holding. Pet. App. 12a (emphasis added). The court also stated elsewhere in its opinion that "there is nothing in the authorities that justifies what the school did," *id.* at 21a, in part because cases holding "that conduct like Morse's is not a constitutional violation" were distinguishable, *id.* at 19a. In effect, the court thereby inverted the analysis by asking whether it was clearly established that petitioners' conduct was *lawful*, not whether it was clearly established that their conduct was *unlawful*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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